NO. 82-1295

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1983

ESCAMBIA COUNTY, FLORIDA, ET AL.,
Appellants,

v.

HENRY T. MCMILLAN, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF APPELLEES

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Appellees Henry T. McMillan, Robert Crane, Charles L. Scott, William F. Maxwell, and Clifford Stokes, on behalf of themselves and the class of black citizens of Escambia County, submit this brief and request the Court to dismiss the appeal or to affirm the judgment of the Court of Appeals.

JURISDICTION

This Court does not have jurisdiction over this appeal under 28 U.S.C. §1254(2), as Appellants assert. No state statute or constitutional provision has been invalidated by the judgment below. See Argument, *infra* at p. 8.

STATEMENT OF THE CASE

This action by black citizens challenging the at-large system for electing county commissioners in Escambia County, Florida, commenced on March 18, 1977. J.A. 45. Following a nine-day nonjury trial, the district court entered an opinion and judgment on July 10, 1978, finding that the election scheme had been maintained for a racially indivious purpose and that it effectively diluted the voting strength of black voters in violation of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. §1973, and the fourteenth and fifteenth amendments. J.S. 71a, 114a.[1]

Acknowledging the directions in *Wise v. Lipscomb*, 437 U.S. 535 (1978), the District Court postponed entry of a remedial order to provide the state an opportunity to present a legislative plan meeting constitutional requirements. J.S. 104-05a.[2] The Florida Constitution requires all noncharter counties to utilize at-large elections exclusively for their county commissions. Fla. Const. Art. VIII, §1; J.S. 123-24a. The local legislative delegation had already appointed a charter committee

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[1]Similar claims against the election systems for the Escambia County School Board and the City of Pensacola Council were tried and decided at the same time. The district court found racial motives behind all three election schemes and concluded that all three were unconstitutional and unlawful. J.S. 99a-100a. The City of Pensacola and one member of the school board (but not the entire board) appealed with the county commissioners to the Court of Appeals. The Court of Appeals affirmed the judgments against the city council and school board election structures, and both matters are now finally resolved. *Jenkins v. City of Pensacola*, 638 F.2d 1249 (5th Cir. 1981), *appeal and pet. for cert. dismissed per stipulations*, 453 U.S. 946 (1981); *McMillan v. Escambia County*, 638 F.2d 1239 (5th Cir. 1981).

[2]The Pensacola City Council, which operates under a home rule municipal charter, adopted by ordinance a mixed plan of seven single-member districts and three at-large seats. Under *Wise*, the district court gave legislative deference to the city council's plan and ruled that it met constitutional standards. Plaintiffs appealed this remedial plan, but the Court of Appeals affirmed. *See generally, Jenkins v. City of Pensacola, supra*. There was no legislative proposal for the school board, and a court-ordered plan, utilizing single-member districts exclusively, was adopted for that body. *See McMillan v. Escambia County, supra*.

and had set in motion the process for a referendum election on home rule. J.S. 67a; J.A. 318. The election system in the proposed charter called for a seven-member county commission with five elected from single-member districts and two elected at large. J.S. 67a. In light of *Wise v. Lipscomb*, the District Court gave legislative deference to the charter proposal and approved the 5-2 plan as satisfying constitutional requirements. J.S. 70a. However, on November 6, 1979, Escambia County's voters defeated the home rule proposal. J.S. 54a. Accordingly, on December 3, 1979, the District Court adopted a court-ordered election plan consisting of five single-member districts. J.S. 59a. Another 5-2 plan advanced by the incumbent county commissioners was rejected on the ground that, lacking home rule powers, the commission had no authority under Florida law to change the constitutionally designated at-large structure. J.S. 68a.

On February 19, 1981, the Court of Appeals reversed the judgment against the county commission at-large system, holding that the district judge's disbelief of the commissioners' "good government" reasons was insufficient to support a finding of racial intent in the absence of other contradictory evidence. J.S. 43a. However, on September 24, 1982, the panel granted Plaintiffs' petition for rehearing and affirmed the District Court's judgment striking down the at-large county commission election system. J.S. 1a. In its opinion on rehearing, the Court of Appeals acknowledged that the district judge had in fact considered a wide range of other historical evidence and testimony that supported his finding of invidious intent, and that there had been inconsistencies in the commissioners' non-racial explanations. J.S. 13-21a. Obeying the teaching of this Court's intervening decision in *Rogers v. Lodge*, 102 S.Ct. 3272 (1982), the Court of Appeals concluded that the District Court's findings of fact were supported by the evidence and were not clearly erroneous. J.S. 21-22a. Finally, it affirmed the District Court's remedial rulings as properly applying the principles of *Wise v. Lipscomb*. J.S. 28-29a.

On November 30, 1982, the incumbent county commissioners[3] filed a notice of appeal to this Court, citing 28 U.S.C. §1254(2). J.S. 120-21a. Probable jurisdiction was noted on April 18, 1983. *Escambia County v. McMillan*, 103 S.Ct. 1766 (1983).

On October 4, 1983, the Court denied Appellants' petition for writ of certiorari to review issues concerning redistricting that had arisen on remand and which have not yet been addressed by the Court of Appeals. *Escambia County v. McMillan*, 52 U.S.L.W. 3246 (Oct. 4, 1983). These remand issues concern primarily preclearance under Section 3 of the Voting Rights Act, 42 U.S.C. §1973a, of new district boundaries approved by the District Court as a result of the intervening 1980 census.

SUMMARY OF ARGUMENT

The Court does not have jurisdiction over this appeal, because no state statute has been declared invalid by the Court of Appeals. The District Court did enter findings of fact and conclusions of law that support its judgment on the alternative ground that the state constitutional provision requiring at-large elections in noncharter counties is invalid as applied to Escambia County. But the judgment of the Court of Appeals is grounded solely on the District Court's finding of fact that the county commissioners, for racially invidious reasons that violate the fourteenth amendment, chose not to adopt an alternative single-member district election method that is authorized by the Florida Constitution.

If the Court nevertheless considers the appeal as a petition for writ of certiorari, the petition should be denied. Because the Court of Appeals declined to consider the Voting Rights Act claim, reversal of the constitutional ruling striking down the at-large plan would, at most, require a remand for consid-

[3]This appeal was taken by Escambia County, Fla., and the members of its Board of County Commissioners. J.S. 120a. The five commissioners who were elected November 1, 1983, and who will take office November 15 are Phil Waltrip, Kenneth Kelson, Willie Junior, Max Dickson, and Grady Albritton. The Supervisor of Elections is not a party to the appeal. Appellants' Brief at 1 n.1.

eration of the same facts to determine if there has been a statutory violation. Moreover, the remedy issues presented by the Appellants concern only the construction of Florida law. The Attorney General of Florida agrees with both lower courts that the county commission is barred by state law from changing its election system, unless the county adopts home rule. Escambia County's voters defeated the home rule charter presented to them during the remedy phase of this case. The Florida Legislature has been asked to address this question, and the Court should not inject itself in the state's deliberations about what government body should be given authority to adopt a legislative remedy for an unconstitutional election system.

If the Court decides to review this case on its merits, the judgment of the Court of Appeals should be affirmed. There is extensive evidence supporting the District Court's finding of fact that the decision of the incumbent commissioners not to give the voters a single-member district option was racially motivated. The district judge listened to the in-court testimony of the commissioners and found that their nonracial explanations were inconsistent with their current practices and could not be believed. The applicable standard of review does not permit setting aside this finding unless it is clearly erroneous. *Rogers v. Lodge,* 102 S.Ct. 3272 (1982); *Pullman Standard v. Swint,* 102 S.Ct. 1781 (1982). In this case, the District Court assessed the Appellants' motives in light of the criteria for detecting invidious intent set out in *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977). The District Court also applied the analytical standards later approved by this Court in *Rogers v. Lodge, supra.* The trial judge made specific findings that the at-large system systematically denies black voters in Escambia County an equal opportunity to participate in the electoral process. Looking beyond this adverse impact, leading up to the incumbent commissioners' actions he found a century-long historical background of official manipulation of the election system for the purpose of excluding the electoral choices of black citizens. The official policy of Florida during the half a century when the election

was determined in the all-white primary favored single-member districts. The primaries changed to at-large voting in 1954, after this Court struck down the white primary. The District Court's findings, therefore, make this a paradigm of the kind of intensely factual decision that ought not to be disturbed on appeal.

Independent of the appellant commissioners' racial motives, the findings of fact made by the District Court in regard to the purposefully discriminatory history of the state law governing the county commission election system provide alternative constitutional grounds, not reached by the Court of Appeals, for affirming the judgment:

(1) The at-large election requirement for noncharter county commissions was adopted in 1901 in violation of the fifteenth amendment, because black citizens were officially denied the right to vote in the referendum election that approved the constitutional amendment.

(2) For the first half of the twentieth century, Florida operated a "dual" election system, in which white voters were allowed to use single-member districts in the all-white Democratic Primary – the only election that counted, while blacks were restricted to voting in the at-large general elections. The state officially authorized blacks to vote in the primary in 1945 and then changed to at-large voting in the primaries in 1954. But, the District Court found, polarized racial voting, caused in part by past official sanction of the dual election system, continues systematically to defeat all of the blacks' electoral choices under the at-large scheme. Consequently, in Escambia County, the state has failed to take adequate steps to eliminate the vestiges of the de jure dual system.

(3) Under a separate theory, suggested by Justice Stevens, a racial legislative purpose in the at-large election law may be inferred solely from the following objective facts found by the District Court: For the last two decades, the at-large county commission election system has resulted in the systematic defeat of blacks' electoral choices, on account of a predictable antagonistic vote by the controlling white majority bloc. In addition, the election system is characterized by special features, num-

bered places and a majority vote requirement, that demonstrate a clear design to maximize the political strength of the majority faction.

Since the judgment in this appeal was entered, the District Court has ordered a new election plan, based on the 1980 census. *McMillan v. Escambia County*, 559 F.Supp. 720 (N.D. Fla. 1983). Although the new remedial plan technically may not moot this appeal (because the District Court rested its 1983 remedy order, in the first instance, on law of the case), there is a serious question whether in this appeal the remedy issue remains meaningful.

In providing a remedy for the constitutional violation, the District Court carefully followed the teaching of *Wise v. Lipscomb*, 437 U.S. 535 (1978). The Florida Constitution specifies the use of at-large elections for county commissions, except where the county adopts home rule, in which event it may choose any election method it wishes in its charter. Following entry of its judgment striking down the at-large scheme, the District Court withheld a ruling on remedy to allow the county's citizens time to vote on a proposal initiated by Escambia County's legislative delegation to adopt a home rule charter. Before the referendum was held, the court ruled that, if it passed, the proposed charter's mixed plan of five single-member districts and two at-large seats would be a constitutionally adequate legislative remedy. However, the voters defeated the charter referendum. Accordingly, the District Court entered its own remedial plan, which consisted exclusively of five single-member districts. It held that another 5-2 plan urged by the county commissioners was not entitled to legislative deference, because the state constitution forbids a noncharter county from using any method other than at-large elections.

Appellants' first contention is that, notwithstanding the explicit specification of at-large voting for noncharter county commissions, state authority for the incumbent commissioners to adopt a new election system can be inferred from the Florida Constitution. Both lower courts rejected this strained interpretation of state law.

Appellants' second contention is that the District Court should have accorded their 5-2 plan legislative deference regardless of whether state law authorized the county commission to change its own election system. This position is contrary to the holding of *Wise v. Lipscomb*. If it were accepted by the Court, it would directly repudiate the will of Escambia County's electorate and would otherwise invite unnecessary federal court interference in the state's constitutional procedures for determining local election structures.

Finally, Appellants contend that *McDaniel v. Sanchez*, 452 U.S. 130 (1981), has overruled *Wise v. Lipscomb*. This simply is incorrect. *McDaniel v. Sanchez* was concerned solely with interpreting the coverage of Section 5 of the Voting Rights Act and did not consider the issue in *Wise v. Lipscomb*: whether federal courts should defer to the election systems proposed by local government bodies regardless of their state authority to enact such changes.

ARGUMENT

I. The Appeal Should Be Dismissed For Want Of Jurisdiction.

Appellants base this appeal on 28 U.S.C. §1254(2), claiming to be parties "relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States." But the Court of Appeals has not held any state statute to be invalid in the instant case. Section 1(e) of Article VIII of the Florida Constitution. J.S. 123a, which provides for at-large county commission elections in noncharter counties, has not been invalidated. Rather, the Court of Appeals has held that relevant local officials of Escambia County, for invidious racial reasons, have chosen not to exercise the option afforded by the home rule provisions of the state constitution to change to single-member districts. J.S. 20a and n.19. Accordingly, the conditions of 28 U.S.C. §1254(2) are not satisfied, and this appeal should be dismissed. See *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 103 S.Ct.

948 (1983); *Lockwood v. Jefferson Area Teachers' Ass'n*, 103 S.Ct. 27 (1983).

Appellees realize that, even though the Court lacks jurisdiction of this appeal under 28 U.S.C. §1254(2), in its discretion it could treat the appeal papers as a petition for writ of certiorari and review the case nonetheless. *Perry Education Ass'n v. Perry Local Educators' Ass'n, supra*, 103 S.Ct. at 954. However, for the following reasons, certiorari should be denied. *See Lockwood v. Jefferson Area Teachers' Ass'n, supra.*

First, with respect to the liability issues, the judgment of the Court of Appeals is grounded solely on the fourteenth amendment. J.S. 3-5a n.2, 29a. If this Court were to reverse the constitutional ruling, it still would be necessary to remand for consideration of the statutory claim under the amended Section 2 of the Voting Rights Act.[4] *See Cross v. Baxter*, 103 S.Ct. 1515 (1983). Appellees do not presume that this Court would be inclined to address the amended Voting Rights Act issues when it has not been considered by either court below. Accordingly we will not discuss in this brief how the findings of fact made by the trial court satisfy the "results" standard established by Congress under the amended Section 2.[5] If the Court does wish to review the statutory issue on the merits at this time, we suggest that the parties be so notified and that additional briefs be requested.

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[4]The District Court grounded its judgment on the unamended Section 2 of the Voting Rights Act, as well as on the Constitution. J.S. 101a. The Court of Appeals thought that Appellees had "presented a cogent argument that the amended Act entitles them to relief," but declined to reach the statutory question. J.S. 4-5a n.2. 42 U.S.C. § 1973 (1976), as amended by Pub.L. 97-205, 96 Stat. 131 (1982) took effect upon enactment, i.e., June 29, 1982, and should apply to pending litigation. *See generally Hutto v. Finney*, 437 U.S. 678, 694-695 n.23 (1978); *Bradley v. Richmond School Board*, 416 U.S. 656 (1976); *Cort v. Ash*, 422 U.S. 66 (1960); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 1032 (1801). Both the House and Senate Floor Managers stated that "Section 2 . . . will, of course, apply to pending cases in accordance with . . . well established principles . . ." 128 Cong. Rec. H3841 (daily ed. June 23, 1982) (remarks of Rep. Sensenbrenner); 128 Cong. Rec. S. 7095 (daily ed. June 17, 1982) (remarks of Sen. Kennedy).

[5]Senate Report No. 97-417, 97th Cong., 2d Sess., p.27 (1982).

Second, the remedy issues Appellants seek to raise are, on the facts of this case, clearly without merit. The courts below properly rejected the county commissioners' contention that they could exercise home rule legislative powers that the voters had denied them in two recent charter referendums. By challenging these rulings, Appellants are asking the Court to disregard the state constitution and to inject itself unnecessarily in a question the Florida Legislature is about to consider regarding the proper allocation of power to change county commission election systems.

Moreover, because another election plan was adopted by the District Court in 1983, resolution of the issues presented concerning the 1979 plan may not finally dispose of the remedy issues now pending in the Court of Appeals. See fn.69 *infra*.

II. The Judgment Below, Grounded On The Fourteenth Amendment, Should Be Affirmed, Because The Trial Court's Factual Findings Of Racial Motives Behind The Appellants' Decision To Retain The At-Large Scheme Are Not Clearly Erroneous.

The Court of Appeals affirmed the District Court's finding of a fourteenth amendment violation because the trial judge squarely had addressed the question of intent and had found, as a matter of fact, that the county commissioners had decided to retain the dilutive at-large system, at least in part, for racial motives. J.S. 21-22a. The District Court's inquiry into the purpose of the election plan was specific and carefully focused. This was not a case, like *Rogers v. Lodge*, 102 S.Ct. 3272 (1982), where the court inferred invidious intent solely from the broad circumstances of longstanding official discrimination against blacks in the local community.[6] Rather, the District Court in the instant case looked in the eyes of the local officials who, at the time of trial, had been responsible for the latest decisions to reject single-member district proposals and did not believe their nonracial explanations. J.S. 96-98a. The court

[6]102 S.Ct. at 3279-81.

found, again as matters of pure fact, that the recent racially motivated actions of the Appellants were only the latest in an unrelieved series of changes in the election structure, extending over 100 years, that were intended to deny black citizens the opportunity to elect county commissioners of their choice. J.S. 73-77a, 92-93a, 96-98a. The District Court further buttressed its findings of intent by considering all of the circumstantial factors enunciated in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[7] including exhaustive evidence of the present adverse impact of the at-large scheme on blacks' voting strength. J.S. 79-92a.

Under *Rogers v. Lodge*[8] and *Pullman Standard v. Swint*,[9] the District Court's findings of racial intent may not be disturbed unless they are clearly erroneous. Considering the depth and comprehensiveness of the evidence supporting the trial judge's findings here, the judgment should be affirmed.

The district judge was able to hear the testimony and observe the demeanors of four of the county commissioners on the stand. J.A. 470, 495, 507, 532. He did not believe their purported nonracial reason for striking down the district election proposals. J.S. 96-98a. Not only was this critical finding on the question of credibility buttressed by all the *Arlington Heights* circumstantial evidence, but glaring inconsistencies effectively impeached the Appellants' testimony.

The race-neutral reason alleged by the commissioners for striking the single-member district proposals was to avoid the "individual little kingdoms" that supposedly had existed under the pre-1954 district system. J.A. 511; *accord,* J.A. 481, 498, 540. But cross-examination revealed that even under the existing at-large system each of the county commissioners was running the same little kingdom, because he exercised final control over the road and bridge funds allocated to his residency subdistrict. J.A. 473-74, 478-79, 487, 498, 514, 520, 523-24.

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[7] 429 U.S. 252 (1977).
[8] 102 S.Ct. at 3278.
[9] 102 S.Ct. 1781 (1982).

There were other contradictions in Appellants' testimony. Commissioner Deese, who as a charter committee member had "go[ne] over the charter word by word to see what needed to be adjusted," J.A. 510, could not explain why, with no objections, he had signed the unanimous committee report urging the adoption of single-member districts and then reversed his position when the charter came before the county commission. J.A. 510, 528-30. One of the commissioners had not consulted or heard from black citizens concerning their feelings about the election structure. J.A. 488, 492. Three testified that they would not consider blacks' vote dilution in deciding their preference for election plans. J.A. 490, 492, 504, 530-31. Commissioner Kenney's testimony at trial directly contradicted the views he had expressed at the public hearing.[10]

It is important to notice that the purportedly nonracial justification of trying to maintain their incumbencies was not even mentioned by the county commissioners on the stand. It appeared for the first time in a post-trial memorandum filed by their counsel. J.S. 98a. In other words, their post-trial memorandum impeached the commissioners' "little kingdom" explanation at trial. This was the point made by the district

[10]At trial, Mr. Kenney took this view of changes in the commission's responsibilities:

> I voted for countywide representation. I voted for it basically on the premise that there are issues and problems that transcend district lines and perhaps did not exist, these problems did not exist in, prior to 1950 when the old road boards were in operation.

J.A. 540. But previously, at the public hearing, Mr. Kenney, responding to a black citizen's plea for single-member districts, had viewed the modern problems in the opposite light:

> I think you have a very valid point, and I am not really very strong on county wide thing myself. I don't really feel it is that important. I feel like to a degree, it is kind of a hang over from the old Road Board that this Commission used to be where the Commissioner's only job was to take care of paving roads in a certain district and that was all he had to worry about. We have progressed quite a ways since then, where we deal with municipal problems a great deal more since ⅔'s of our population lives outside the city limits and still wants municipal services.

J.A. 1135.

judge, who wrote that independently he had found the commissioners' good government justifications to be unbelievable. *Id.* Instead, the trial judge concluded, the commissioners' motive for rejecting the proposals for single-member districts "was to continue the present dilution of black voting strength" so that none of them could be replaced by a black candidate. *Id.*

Such a motive is not, as Appellants now contend, race-free. The District Court did not ground its finding of invidious intent on the incumbents' motive to exclude all other potential candidates, but on their intent to exclude black potential candidates in particular.[11] This is no different than the finding upheld by this Court in *Rogers v. Lodge*. But whereas the trial judge in *Rogers* had to infer from total legislative inactivity that state lawmakers intended to retain Burke County's at-large system in order to minimize black political strength, 102 S.Ct. at 3280, the district judge in the instant case could base the same finding on specific legislative events and the opportunity to observe the testimony of the relevant officials.[12] J.S. 77a, 96a-98a.

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[11]

> To this court the reasonable inference to be drawn from their actions in retaining at-large districts is that they were motivated, at least in part, by the possibility single district elections might result in one or more of them being displaced in subsequent elections by blacks.

J.S. 98a. The evidence reveals at least one occasion when the commissioners were squarely confronted with this prospect. At the public hearings, a black precinct committeeman said to them:

> Thank you. The very first part where it says five members elected county wide. County wide automatically kills it for me because eventually I plan on running maybe for one of your jobs. As long as it is county wide, I can never beat Jack Kenney out.

J.A. 1133.

[12]Although Justice Stevens would not invalidate any electoral device simply because the elected officials were "motivated by a desire to retain control of the local political machiney," *Rogers, supra*, 102 S.Ct. at 3292 (J. Stevens, dissenting), the findings in the instant case satisfy even his standards. The Appellant Commissioners made no attempt to justify an at-large scheme that employed both a majority-vote and numbered place requirements in the primary, "device[s] that serve[] no purpose other than to exclude minority groups from effective participation. . . ." Id.

The District Court's findings here are grounded on virtually every type of direct and circumstantial evidence that this Court has referred to in its decisions concerning discriminatory intent. Indeed, in the section of its opinion devoted entirely and explicitly to the issue of intent, the District Court was guided by the criteria of *Arlington Heights*.

> In *Arlington Heights* the Supreme Court set out several factors indicative of discriminatory intent. They are (1) the effect of the official action, (2) the historical background of the decision, "particularly if it reveals a series of official actions taken for invidious purposes," (3) the sequence of events, (4) substantive and procedural departures, (5) legislative history. 429 U.S. at 266-68. These criteria must be applied to the official act or acts which give rise to the respective election systems in this case.

J.S. 92a. There was credible evidence of each of these five elements, in addition to the trial judge's actual observation of the commissioners' testimony, supporting his finding that the at-large plan has been maintained for racially discriminatory purposes. Moreover, the District Court "bolstered" its findings of racial intent by an analysis of the circumstantial evidence using the criteria that have been approved in *Rogers v. Lodge*. J.S. 98a.

Appellants also contend that a post-trial, post-judgment charter referendum held in 1979, in which home rule was again rejected by the voters, this time based on a charter proposal that included a 5-2 single-member district and at-large mixed election plan, means that the racial motives of the incumbents in 1975 and 1977 are no longer responsible for the maintenance of the discriminatory election plan. Appellants' Bf. at 31-32. This argument is flawed for at least two reasons. First, the at-large system had been adjudged unconstitutional before the 1979 referendum election took place, and the calling of another referendum election on charter government could not, by itself, meet the state's legal obligation to afford a remedy. Second, even if there had been no prior judicial ruling, if the 1975 and 1977 official actions actually violated blacks' constitutionally protected voting rights, that denial of rights could not be cured "by a vote of a majority of [the county's] electorate." *Lucas v. Forty-fourth General Assembly of Colo.*, 377 U.S. 713, 746 (1964).

(1) *Adverse Impact.*

"The impact of the official action — whether it 'bears more heavily on one race than another' — may provide an important starting point [for a sensitive inquiry about intent]." *Arlington Heights, supra,* 429 U.S. at 266, *quoting Washington v. Davis,* 426 U.S. 229, 242 (1976). The District Court found "that the voting strength of blacks is effectively diluted under the present election systems of the county and city." J.S. 90a (footnote omitted). According to *Rogers v. Lodge, supra,* 102 S.Ct. at 3279, evidence that a distinct racial minority consistently has its candidates defeated by a bloc-voting white majority "bears heavily on the issue of purposeful discrimination." In the instant case, the District Court arrived at this finding after considering "[t]he complete record of county elections since 1955. . . ." J.S. 81a. This massive record was analyzed by an expert statistician and by a political scientist. Numerous black candidates testified about racial bloc voting, discouragement, threats and intimidation which they encountered in their campaigns. Substantial evidence was introduced about black turnout and political participation and about the social and economic disabilities of the black community in Escambia County.

Unrebutted evidence of sharply polarized voting along racial lines was presented to the District Court. An expert statistician[13] analyzed the correlations between the vote received by given candidates in each election precinct with the percentage of registered voters in that precinct who were black, with the median income of residents in the precinct, with party affiliation and with gender of the registered voters. J.A. 733-50, 1277. Step-wise multiple regression analyses[14] of these data were per-

[13]Dr. David Curry, Assistant Professor of Sociology, University of South Alabama. J.A. 1267. Dr. Curry was qualified by the District Court as an expert in the sociological and demographic applications of statistics. J.A. 1268.

[14]Multiple regression analysis is an accepted statistical technique, "a quantitative method of estimating the effects of different variables of interest." *Eastland v. TVA,* 704 F.2d 613, 621 (11th Cir. 1983), *citing* Fisher, "Multiple Regression in Legal Proceedings," 80 Colum.L.Rev. 702 (1980). *See also, Gregg v. Georgia,* 428 U.S. 227, 234 (1976) (J.

formed. *Id.* In modern times, black persons had sought election to the Escambia County Commission on four occasions, to the school board on five occasions, and to the Pensacola City Council on nineteen occasions. J.S. 107-13a. A total of 168 regression analyses were performed.[15] Computer-generated "scatter diagrams," J.A. 751-54, visually displayed what the expert political scientist[16] called "irrefutable" evidence of racially polarized voting. J.A. 421. In addition, the political scientist studied raw election returns, visited Escambia County five times, conducted over twenty in-depth interviews of politically knowledgeable persons in Escambia County, and did background reading in local newspapers and publications. J.A. 401. Based on all this information, he expressed the opinion that, under the at-large system, the votes of black citizens in Escambia County were diluted, in that their electoral preferences were submerged consistently by the bloc-voting white majority. J.A. 403.

The District Court heard extensive testimony from black candidates. J.A. 255-310, 334-74. They were uniformly discouraged from making further attempts as candidates in countywide at-large elections. J.A. 419, 422-25. The consistent defeat of blacks in the past and the high financial cost of countywide campaigning when compared with the paucity of financial re-

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Marshall, dissenting). In particular, regression analysis is an acknowledged method for displaying racial bloc voting. *See Major v. Treen*, ____ F.Supp. ____, Manu.Op. at 30 (E.D.La., Sept. 23, 1983) (3-judge court); *Bolden v. City of Mobile*, 423 F.Supp. 384, 388 (S.D.Ala. 1976), *aff'd*, 571 F.2d 238 (5th Cir. 1978), *rev'd and remanded on other grounds*, 446 U.S. 55 (1980), *on remand*, 542 F.Supp. 1050 (S.D.Ala. 1982).

[15]Pl. Exs. 13-16. All the regression analysis results are summarized at J.A. 771-98. A summary of the analyses only of those elections in which blacks were candidates is appended to the District Court's opinion. J.S. 107-13a. In the county commission elections involving black candidates, the correlation coefficient between race of registered voters and vote obtained by the candidates ranged from 0.85 to 0.98. J.S. 107a. A correlation coefficient of .5 is considered to be unusually high in social science data. J.A. 1274-76.

[16]Dr. Charles Cotrell, Professor of Political Science, St. Mary's University, San Antonio, Texas. J.A. 398. Dr. Cotrell was accepted by the court as an expert in the field of political science. J.A. 398, 400.

sources in the black community were the reasons given.[17] Just as discouraging for black candidates in Escambia County has been the hostility of the white electorate, much of it openly expressed. Charlie Taite, knowing that he needed white votes to win, campaigned door-to-door in white neighborhoods wearing common work clothes, so that he would not seem like a "busybody" and arouse a white backlash. J.A. 264. Rev. Otha Leverette received death threats over the telephone, J.A. 278, and when he tried to conceal the fact that he was black during the general election, his own party published his picture in campaign literature. J.A. 274-75. Dr. Donald Spence also testified to having received telephone threats, as well as other activities directed against him by the Ku Klux Klan. Vol. XVI 558, 565. F. L. Henderson received telephone threats, had the windows of his car destroyed and found a dead cat hung on the door of his home. Vol. XVII 633. Elmer Jenkins received threatening phone calls and had difficulty finding campaign workers who were not afraid of going into the white neighborhoods. Vol. XVII 733, 753. Nathanial Dedmond, a local black attorney, was threatened over the telephone during his campaign. J.A. 353. James Brewer was unsuccessful in his attempts to solicit financial support in the white community. Vol. XVII 802-04. Charlie Taite testified that he had been offered $10,000 to drop out of the election and lost his job when he refused. Vol. XVI 363.

The testimony of black politicians confirmed the feeling of futility and discouragement the political scientist had found among his interviewees. J.A. 419. In his opinion, the reluctance of qualified black citizens to offer as candidates was another manifestation of the inability of the black electorate to have any of its preferences expressed in the political process. *Id.* He found this sense of futility and lack of interest expressed in the turnout data. It shows that black voters turn out at much lower rates than whites except when there are black candidates,

[17]Taite, J.A. 271; Leverette, J.A. 275, 277; Spencer, J.A. 289, 302-03; O. Marshall, J.A. 335-36; Henderson, J.A. 339; Jenkins, J.A. 347; Dedmond, J.A. 351; Hunter, Vol. XVII 784; Brewer, Vol. XVII 802-04.

in which event the black turnout rate has been equal to or higher than the white turnout rate. J.A. 421-432. Governor Rubin Askew, who testified at trial about his involvement, as a freshman state legislator from Escambia County, in the 1959 change of election systems for city council, agreed with the political scientist that lack of fair representation explains the discouragement within the black electorate:

> I have come to believe and believe very strongly that while single-member districting will not require necessarily fair representation among minorities, in my opinion it is the single most important step you can take to better insure representation by minorities. . . . I personally feel that if black people in this case, other minorities, if they are not afforded an opportunity through single-districting to speak and elect some of their own people to the Boards, which that government is supposed to represent them, I don't know how we can say that government is truly representative of all the people. . . . We need more minority representation on government if government is supposed to fairly represent them and if we want young black people in particular to feel they are part of the system. Then they have got to be given a chance in a fair way and not be outvoted with a larger majority.

J.A. 467.

The evidence detailing blacks' current lack of access to the political process in Escambia County followed extensive testimony by two respected Florida historians[18] about the long history of violence, physical and economic intimidation, segregation and official oppression that had marked the previous one hundred years of Florida's history. Based on this evidence the

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[18]Dr. Jerrell Shofner, Professor and Chairman of the Department of History, Florida Technological University, Orlando. J.A. 146. Dr. Shofner has researched and written extensively on Florida history during the Reconstruction and post-Reconstruction periods. J.A. 147. At the time of his testimony in this case, he was serving as President of the Florida Historical Society. *Id.*

Dr. James McGovern, Associate Professor of History, University of West Florida, Pensacola. Pl. Ex. 3. Dr. McGovern was the officially designated Bicentennial Historian for the City of Pensacola. Pl. Ex. 4.

District Court found that during the Jim Crow period in Florida "the white government was unwilling or unable to prevent a shocking degree of violence and intimidation suffered by blacks at the hands of whites." J.S. 93a. Although the modern forms of intimidation described at trial were not as brutal, perhaps, as those of the past, they remain, nevertheless, a real and substantial additional burden for blacks seeking to participate in Escambia County's political process today. The expert political scientist spoke of the "shadow of history" that still hangs over black political participation. J.A. 423.

The District Court also received extensive evidence about the depressed socio-economic condition of the black community in Escambia County, which, under *Rogers v. Lodge, supra,* 102 S.Ct. at 3280, is further evidence that the at-large system has a racial purpose. J.A. 799-1036. Mr. DeVrees, City Planner for Pensacola, admitted that neighborhood blight, including deteriorating housing, poor streets, and lack of recreational facilities, closely correlates with the proportion of blacks in the neighborhood population. Vol. XIX, 1123-24. Mr. Page, a senior planner with the West Florida Regional Planning Commission, testified that his survey of drug abuse, unemployment, poor housing conditions, lack of recreational facilities, crime, welfare, mental health, youth services, fire, tuberculosis and venereal disease also correlated with the proportion of blacks in each neighborhood. Vol. XXI, 1635. Considering all this evidence, the District Court entered the following findings of fact:

> State enforced segregation and discrimination have helped create two societies in the city and county — segregated churches, clubs, neighborhoods and, until a few years ago, schools. These laws left blacks in an inferior social and economic position, with generally inferior education. The lingering effects upon black individuals, coupled with their continued separation from the dominant white society, have helped reduce black voting strength and participation in government.

J.S. 86a. Similar findings of "lingering effects of past discrimi-

nation" were approved in *Rogers v. Lodge, supra,* 102 S.Ct. at 3280.

Finally, with regard to the adverse impact of the at-large system, the District Court found "independent significance" in the severe underrepresentation of blacks on appointed county boards and committees. J.S. 90a. *Accord, Rogers v. Lodge, supra,* 102 S.Ct. at 3280. "With such a paucity of black elected and appointed representatives, blacks are excluded from almost all positions of responsibility in the governmental policymaking machinery." J.S. 90-91a.

(2) *The Historical Background.*

The racially motivated charter decisions of the county commissioners were only the latest of a series of invidiously intended legislative election changes.

The District Court made explicit findings of fact that Florida's official policy from 1868 until at least 1954 was to maintain a county commission election structure that assured that no black person could be elected. Under *Arlington Heights,* 429 U.S. at 267, "[t]he historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes." (Citations omitted). Similarly, *Rogers v. Lodge* relied on "the impact of past discrimination on the ability of blacks to participate effectively in the political process." 102 S.Ct. at 3279.

The following chain of decisional responsibility[19] was established for the election system used in Escambia County:

(1) From 1868 to 1901 the county commissioners were appointed by the governor "to ensure against the possibility that blacks might be elected in majority black counties." J.S. 74a, 16a. The delegates to the 1868 and 1885 Florida Constitutional Conventions were responsible for the development and maintenance of this system. J.A. 154-59.

[19]The District Court's findings cannot be faulted for "failure to identify the state officials whose intent it considered relevant." *Rogers v. Lodge, supra,* 102 S.Ct. at 3281 (J. Powell, dissenting), *quoting City of Mobile v. Bolden,* 446 U.S. 55, 74 n.20 (1980).

(2) In 1901 sufficient numbers of blacks had been disfranchised to make white supremacists feel safe about returning the selection of county commissioners to the electorate, and the state constitution was amended to provide for at-large general elections. J.S. 74a. The historical sequence of events and the contemporaneous passage of Jim Crow laws indicated to the district court a racial motive in the adoption of at-large elections. J.S. 92a-93a; Dist. Ct. Op. p. 24.[20] But it declined to find a racial intent behind the adoption of the 1901 constitutional amendment, primarily because the Fifth Circuit previously had held that there could be no racial motive when blacks were already disfranchised.[21]

(3) Both the primary and general elections were apparently conducted on an at-large basis for one election. J.A. 173. But a 1907 statute changed the primary elections to single-member districts, leaving the general elections to be held at large. *Id.* Because the Democratic primary was for whites only and was in effect the only election that counted, the district court found that the "anomaly" of a districted primary and an at-large general election "worked, not surprisingly, to the unique disadvantage of blacks," J.S. 75a, was "clearly race related," J.S. 92a, and was part of "a concerted state effort to institutionalize white supremacy," J.S. 74a. This "dual"[22] election system for county commissioners remained in effect in Escambia County until 1954. Then, in the wake of judicial rulings striking down the all-white primary, the state courts declared that single-member district primaries were inconsistent with the 1901 state constitutional amendment requiring county commissioners to be

[20]Page 24 of the district court's opinion is omitted in the Jurisdictional Statement at p. 92a, after the words "The sequence of". Page 24 of the opinion is reproduced as an appendix to this brief.

[21]J.S. 93a, and Dist. Ct. Op. p. 24, *citing McGill v. Gadsden County Commission*, 535 F.2d 277 (5th Cir. 1976). The District Court also understood Dr. Shofner, Plaintiffs' expert historian, to have "reinforced" the conclusion of *McGill*. *Id.* Actually, Dr. Shofner testified that the elimination of blacks as a political threat is what allowed a return of county government to local control; he did not say that the choice of an at-large scheme had no racial purpose. J.A. 195-96.

[22]J.S. 19a.

elected at large. J.S. 75a-76a. The Florida Legislature and the Democratic Party bore the responsibility for the exclusion of blacks from the real election for county commissioners, which was conducted by single-member districts. J.A. 173-74.

(4) Since 1954, Escambia County's election structure could be changed only by the adoption of home rule, charter government (unless, of course, the state constitution itself were amended). The incumbent county commissioners controlled what charter propositions would be submitted to Escambia County's voters, and the district court found that the commissioners acted with racial motives when in 1975 and again in 1977 they rejected proposals by their own appointed charter committees to change to district elections. J.S. 77a, 96a-98a.

It is important to keep in mind, as the District Court did, that until post-World War II federal intervention began reinfranchising black voters, state policy favored single-member district elections for all three major local government bodies in Escambia County. J.S. 74a, 86a; Dist. Ct. Op. p. 24.

> At-large requirements have been in effect for general elections of county commissioners and school board members since 1901 and 1895, respectively. However, in the primaries, which were then tantamount to election, the commissioners were elected in single-member districts from 1907 to 1954, and school board members from 1907 to 1947. Half the city council was elected from single-member districts until 1959. Moreover, the evidence shows . . . that there were racial motivations connected with the at-large requirements of each of these election systems.

J.S. 86a. During most of this period black citizens were officially excluded from the electoral process by devices like the poll tax and the white-only Democratic primary. J.S. 74-75a; Dist. Ct. Op. p. 24; J.A. 159-64. See *Rogers v. Lodge, supra*, 102 S.Ct. at 3279. Only after the white primary was struck down in 1945 was there a precipitate swing to an at-large policy. J.S. 75a. In the very next session of the legislature, state law was amended to require use of at-large voting for school boards. J.S. 93a. The District Court agreed with the expert

historian that this 1947 change in the school board election structure was racially motivated. J.S. 93-94a; J.A. 183. Next, in 1953 the Escambia County Circuit Court struck down the single-member district feature of county commission primaries, in a lawsuit brought by "good government" groups backed by the Pensacola Journal.[23] The Florida Supreme Court affirmed the decision in 1954.[24] The District Court did not make a finding that the state courts were racially motivated, but the historian expressed the opinion that the lack of official resistance to the change could be accounted for, at least in part, by the desire to preserve white supremacy.[25] Finally, single-member district elections were eliminated from the city council plan in a 1959 charter amendment. J.S. 78a. Relying in part on an editorial from the Pensacola Journal urging voters to approve the charter referendum,[26] the District Court found a racial motive behind this change as well. J.S. 94a.

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[23]Def. Ex. 12; J.A. 1099.

[24]J.S. 75-76a, *citing Ervin v. Richardson*, 70 So.2d 585 (Fla. 1954).

[25]J.A. 183, 209, 213-14. Dr. Shofner explained:

> I think the point is that it did not upset the desires of the people who were in control in the county at that particular time. I think that, however, whether or not it was initiated for this reason, it served them very well

J.A. 214. The record in *Ervin v. Richardson, supra*, supports Dr. Shofner's opinion. Def. Ex. 12. The case was adjudicated from start to finish in two months. The state attorney general intervened solely for the purpose of ensuring statewide uniformity of the election law and did not vigorously defend the fifty-year policy of single-member primaries. The defendant county commissioners did not join the attorney general's appeal, and neither the Democratic Party nor any state political leaders objected. The state supreme court affirmed the circuit judge even as it acknowledged "that nominations of county commissioners by districts has been the established policy of the State for many years. . . ." 70 So.2d at 587. There was no evidence that any attempt was made after the ruling to amend the state constitution or to take any other action to preserve this "established policy."

[26]The 1959 Journal editorial contained a "smoking gun" admission of the racial motives behind the election change and recalled similar changes in the county commission and school board election methods:

> This would be an advantageous change for at least two reasons. One reason is that small groups which might dominate one ward could not choose a councilman. Thus one ward might conceivably

(3) The Sequence of Events.

"The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes." *Arlington Heights, supra,* 429 U.S. at 267. In finding that the Appellant county commissioners had acted with racial motives when they rejected recent single-member district proposals, the District Court relied heavily on the sequence of events. J.S. 77a, 96a. First one and then a second commission-appointed charter committee recommended different forms of districted systems.[27] Blacks appealed to the commissioners in public hearings to accept the committee's proposal for the sake

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elect a Negro councilman, although the city as a whole would not. This probably is the prime reason behind the proposed change.

However, the best argument for the change, the one which we offer, is that all councilmen would be responsible to all city voters, not merely to those in their particular section. Councilmen should have a city-wide viewpoint, not a localized outlook.

We favored such representation in the county, both for school board members and for county commissions. Prior to the Minimum Foundation Law, school board members were chosen by districts, equivalent to city wards. This change was helpful as it widened horizons and banished petty district politics. A vote in Century became as important as a vote in Pensacola.

Later, the News Journal attempted by legislation to have county commissioners elected county-wide, instead of by districts, because the district plan made each commissioner more concerned with his district while roads and other problems crossing district lines were neglected. Legislation failed, but a suit brought by citizens resulted in the Supreme Court deciding the district election was invalid. Now commissioners over the state are chosen by county-wide vote and we think it has resulted in great improvement.

J.A. 1098-99. The editors' juxtaposition of black vote dilution and good government theories illustrates perfectly the point made by Dr. Shofner about policies of this period:

> Mr. Cash, the historian of the Democratic Party in '36, talked about good government in terms of cleaning up the electorate by keeping blacks out of it. I think that that is more satisfactory to a person to say than to say, "Let's disenfranchise blacks."

J.A. 183-84.

[27] The 1977 charter committee recommended a five-member county commission with all five elected from single-member districts. J.A. 1233. The 1975 charter committee had added two at-large seats to the five from single-member districts to "provide balanced representation." J.A. 1201.

of fair minority representation. J.A. 1131-41. One commissioner voted for the change as a charter committee member, but later all five commissioners voted to strike the single-member districts before the charter was submitted to the voters. J.A. 528-30.

(4) *Procedural and Substantive Departures.*

The District Court noted that two separate charter committees were appointed by the county commission, and that even after the second committee came back with a single-member district recommendation, Appellants still refused to submit the election change to the voters. J.S. 77a, 96a. "Departures from the normal procedural sequence . . . [and] [s]ubstantive departures too may be relevant, [to a determination of intent]." *Arlington Heights, supra,* 429 U.S. at 267.

(5) *The Legislative History.*

"The legislative . . . history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Arlington Heights, supra,* 429 U.S. at 268. The reports of the charter committees, J.A. 1195-1227, and the transcript of one public hearing conducted by the county commission, J.A. 1131, were introduced in evidence. They show that Appellants made no attempt to respond to the carefully articulated reasons given by the charter committee for favoring district elections.[28] In particular, the committee squarely rebutted the rationale Appellants gave the District Court. Compare J.S. 77a with J.A. 1201:

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[28]

> District representation will cut the mounting cost of running for Countywide election, and the increasing reliance on special interest for financing. The districts will also insure meaningful representation and allow close identification and scrutiny of the district Commissioners. The district Commissioners will be closer to the people who elected them and more responsive to district problems and needs. The district Commissioners will have a ready and in-hand knowledge of their districts.

J.A. 1201.

> There may be an argument that district Commissioners may be responsive to district pressures first and consider vital Countywide matters second. It is based upon the assumption and not fact that the County Commission can only act as a unit in passing County laws or establishing policy or issuing administrative directives.

Finally, "members [of the decisionmaking body were] called to the stand at the trial to testify concerning the purpose of the official action. . . ." *Arlington Heights, supra*, 429 U.S. at 268. As discussed, *supra* at pp. 10-3, the district judge was able to gauge the commissioners' credibility by direct observation. When, as here, the factfinder's conclusion is supported by literally every conceivable kind of direct and circumstantial evidence, there is no basis for disturbing it on appeal.

III. The District Court's Findings Provide Additional Constitutional Grounds For Affirming The Judgment Of The Court Of Appeals.

The Court of Appeals affirmed the judgment under the fourteenth amendment on the ground that the District Court did not clearly err in finding that the incumbent county commissioners acted, in part, with racial motives when they struck districted elections from the 1975 and 1977 charter proposals. J.S. 20-22a. The Court of Appeals did not decide whether the District Court's other findings supported its conclusions that judgment for Plaintiffs could be grounded on (unamended) Section 2 of the Voting Rights Act and the fourteenth and fifteenth amendments. See J.S. 100-101a. For reasons stated at p. 9 *supra*, we have not briefed the statutory issue. But if the Court decides to review the constitutional issues, it ought to consider the additional fourteenth and fifteenth amendment bases for affirming the judgment below.

A. *The Judgment Below May* ***Be Affirmed Under the Fifteenth Amendment, Because the At-Large Scheme Was Adopted Through a Referendum Election in Which Black Citizens Were Denied the Right to Vote.***

In its opinion on rehearing the panel stuck by the view expressed by the plurality in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), that vote dilution cases are not cognizable under the fifteenth amendment. J.S. 4a n.2. However, in this Court, given the peculiar facts of this case, the fifteenth amendment affords an alternative ground for affirming the judgment below, a ground that would satisfy even the standard of the *Bolden* plurality.

It is undisputed that in the last two decades of the nineteenth century the State of Florida enacted constitutional and statutory measures designed to disfranchise its black citizens and that by 1900 only a few blacks were still registered. J.S. 74a; J.A. 159-61. Ironically, in the instant case this massive official denial of blacks' voting rights has disadvantaged their ability to obtain relief. Adhering to an earlier precedent,[29] both lower courts concluded that, because of the need to prove invidious intent, the elimination of blacks as a statewide electoral threat foreclosed the possibility that the 1901 constitutional amendment mandating at-large voting in the general election for county commissioners could have been adopted in violation of the fourteenth amendment. J.S. 20a n.18, 93a and n.8.

By holding that the "race-proof"[30] origin of the election scheme constitutionally exonerates its continued use, the courts below have overlooked the line of cases that command federal courts to provide effective remedies for blacks whose fifteenth amendment right to vote plainly has been denied in state or local elections.[31] These decisions hold that when blacks pur-

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[29]*McGill v. Gadsden County Commission*, 535 F.2d 277 (5th Cir. 1976).

[30]*Bolden v. City of Mobile*, 571 F.2d 238, 245 (5th Cir. 1978), *rev'd and remanded*, 446 U.S. 55 (1980), *on remand*, 542 F.Supp. 1050 (S.D. Ala. 1982).

[31]*Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967); *Hamer v. Campbell*, 358 F.2d 215 (5th Cir. 1966); *Alabama v. United States*, 304 F.2d 583

posefully have been denied the right to participate in an election, a *per se* fifteenth amendment violation is established, and "the sole question remaining is the sort of relief to be granted."[32] Providing such relief, the federal court of equity "may use any available remedy to make good the wrong done."[33]

Appellees do not contend that every legislative action taken during the period when blacks were officially disfranchised must be voided or that all elections conducted during this period should be set aside. But in this case there is a direct, undeniable connection between the undisputed fifteenth amendment violation and the 1901 legislative adoption of the election structure being challenged. Because the at-large scheme was installed through an amendment to the state constitution, the electorate was an integral part of the legislative process. Thus blacks were officially barred from the decision to adopt the very same state law that they have demonstrated to be a present cause of their exclusion from the political process in Escambia County. The 1901 statewide referendum election ought not be voided altogether eighty years later. But federal courts are not powerless to provide a remedy in those counties, like Escambia, where the state cannot demonstrate affirmatively that the unconstitutionally established at-large structure no longer disadvantages the class of black citizens.[34]

(5th Cir. 1962); *Toney v. White*, 348 F.Supp. 188 (W.D. La. 1972), *aff'd in part and rev'd in part*, 476 F.2d 203, *modified on rehearing*, 488 F.2d 310 (5th Cir. 1973) (en banc).

[32]*Bell v. Southwell, supra*, 376 F.2d at 662.

[33]*Alabama v. United States, supra*, 304 F.2d at 590, *quoting Bell v. Hood*, 327 U.S. 678, (1946).

[34]*Cf. Gomillion v. Lightfoot*, 364 U.S. 339, 347-48 (1960). Once invoked, "the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Milliken v. Bradley*, 433 U.S. 267, 281 (1977), *quoting Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 15 (1971).

B. *The Judgment Below May Be Affirmed Under the Fourteenth Amendment, Because For Half a Century the At-Large Election Was Part of the State's Design to Exclude Blacks From the Political Process.*

In addition to its findings about state actions in the 1970's intended to retain a racially discriminatory election system, the District Court found that, at least during the period from 1907 to 1954, the maintenance of at-large voting in the general elections for county commissioners was part of "a concerted state effort to institutionalize white supremacy." J.S. 74a. The District Court found that, following the successful efforts late in the nineteenth century to disfranchise Florida's black citizens,

> [b]lack participation in the electoral process was further hampered by the Jim Crow laws and the exclusion of blacks from the Democratic Party, both of which began in 1900. A few years later, the state provided for primary elections of county commissioners . . . in which the candidates were elected from single-member districts. 1907 Fla. Laws, Ch. 5697, §1. By that time the white primary system, effectively disfranchising black voters, was firmly established. The resulting anomaly between having district primary elections and at-large general elections worked, not surprisingly, to the unique disadvantage of blacks. Since blacks could not vote in the Democratic Primary district elections, they were forced to challenge white Democratic nominees in at-large elections in which blacks had no voter majorities. In effect, the white primary was the election.

J.S. 75a.

These findings establish two critical points: (1) for nearly fifty years, state policy favored the use of single-member districts for the election of county commissioners, and (2) by maintaining an at-large system in the general elections, Florida denied black citizens as a class the opportunity to participate in single-member district elections. Such a situation is in relevant respects constitutionally indistinguishable from Florida's

contemporaneous maintenance of *de jure* school segregation.[35] There was a "dual"[36] county commission election system as well as a dual school system. Florida removed its official imprimatur from the dual election system in 1945 by opening the Democratic primary to blacks.[37] But it did not carry out in the election area the same affirmative obligation it had in the schools to "dismantle" or "disestablish" the racially discriminatory vestiges of the *de jure* system. *See Green v. County School Board (New Kent County)*, 381 U.S. 430, 437-40 (1968).[38] Instead, in 1954 the state merely eliminated the single-member district feature of the primary elections.[39] In light of the district court's finding that present-day racially polarized voting in Escambia County "result[s] from the prior state enforced segregation of the races," J.S. 87a, the imposition of at-large schemes in both the primary and general elections perpetuated the prior official exclusion of blacks from the political process in the same way that freedom of choice policies perpetuated *de jure* school segregation.[40]

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[35]*E.g., Augustus v. Board of Public Instruction of Escambia County*, 306 F.2d 862, 869 (5th Cir. 1962).

[36]J.S. 19a.

[37]J.S. 75a, citing *Davis v. State ex rel. Cromwell*, 156 Fla. 181, 23 So.2d 85 (1945).

[38]The disestablishment principle of *Green* was applied in the context of discriminatory election systems in *Kirksey v. Board of Supv'rs of Hinds County*, 554 F.2d 139, 144-45 and n.12 (5th Cir.) (en banc), *cert. denied*, 434 U.S. 968 (1977). *See also*, Note: "Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law," 92 Yale L.J. 328, 346-47 n.113 (1983).

[39]J.S. 75-76a, citing *Ervin v. Richardson*, 70 So.2d 585 (Fla. 1954).

[40]*Green v. County School Bd., supra*, 391 U.S. 437. Just as prior *de jure* segregated school systems are required to do more than merely end official assignment of students on the basis of race, so should a jurisdiction that has institutionalized racial segregation in election structures have an affirmative constitutional obligation to disestablish all its vestiges. *C.f. Keyes v. School Dist. No. 1*, 413 U.S. 189, 200 and n.11 (1973), *citing Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 15 (1971). *See* Schnapper, "Perpetuation of Past Discrimination," 96 Harv. L. Rev. 828, 855-58 (1983) ("When governmental discrimination creates continuing social or physical conditions, each injury caused by those conditions is a fresh constitutional violation. The appropriate remedy in such cases is not merely to redress specific injuries, but also to disestablish

The maintenance of at-large election structures in both the primary and general elections of county commissioners in Escambia County unconstitutionally perpetuates[41] prior *de jure* exclusion of black citizens from the political process. Because the past official discrimination that is being perpetuated was a dual election system, the causal connection between past acts and present injury to blacks' effective exercise of the franchise is even more direct here than it was in similar perpetuation circumstances condemned by the Court.[42] There is, therefore, even less constitutional justification for allowing the facially neutral at-large system to continue in Escambia County.

C. *Considering Only Objective Factors, the District Court's Findings Support Its Conclusion That the At-large Election System Purposefully Dilutes Blacks' Voting Strength.*

A separate theory for detecting purposeful discrimination behind at-large election laws has been suggested by Justice Stevens. *Rogers v. Lodge, supra,* 102 S.Ct. at 3286-88 (J. Stevens, dissenting). This analysis was not employed by the courts below, but in this Court it affords an alternative ground for affirmance.

Analyzing voluminous, comprehensive evidence of how local elections have operated over two decades, the District Court found that a geographically isolated, politically cohesive racial

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whatever ongoing state of affairs produced those injuries and threatens future harms.").

[41]The particular at-large scheme utilized in the primary elections actually aggravates the racially dilutive effect of the overall election system by injecting a majority vote requirement, which maximizes the strength of the majority in Escambia County. See pp. 32-33 *infra*.

[42]*Rogers v. Lodge, supra,* 102 S.Ct. at 3280 (inferring discriminatory intent, in part, from election practices, "which though neutral on their face, serve to maintain the status quo," where past discrimination was found in non-election areas like jury selection and public hiring); *White v. Regester, supra,* 412 U.S. at 769 (single-member districts properly ordered to remedy broad societal discrimination against Mexican-Americans). *See Hartman,* "Racial Vote Dilution and Separation of Powers: An Exploration of the Conflict Between the Judicial 'Intent' and the Legislative 'Results' Standards," 50 Geo. Wash. L. Rev. 689, 719 (1982).

group has had its electoral choices systematically excluded by a bloc-voting majority. J.S. 79a-84a, 86a-87a. The evidence underpinning this holding went far beyond a mere showing that disproportionately few blacks had been elected, and the court did not merely presume that the inherent tendency of at-large schemes to submerge minority voting strength accounted for their poor showing. Rather, Plaintiffs-Appellees proved that, over a substantial period of time, members of the black community have supported with their votes candidates identified with their interests, but that the white majority, voting as a controlling bloc,[43] had consistently and predictably defeated them.[44] In addition, the parties stipulated that in Escambia County there was sufficient residential segregation to make it probable that at least some of the black voters' choices would prevail in a districted election. J.A. 78.

This Court has held that trial court findings like these go far toward establishing purposeful discrimination, but that they are "insufficient in themselves" absent "other evidence" that blacks do not have an equal opportunity to participate in the political process.[45] Justice Stevens has urged that this "other evidence" be sought out not in the subjective motives of particular officials but in "objective circumstances that . . . would invalidate a similar law wherever it might be found."[46] Justice Stevens has expressed the further view that objective evidence of an unconstitutional at-large election plan may be found in "additional features" or "special features" like the majority vote requirement and numbered places noted by the district court in the instant case.[47] The special features that serve only

[43]Not all majority-race voters voted against the minority's favorites. J.S. 84a. But the courts below correctly held that white crossover voting did not foreclose a finding of majority bloc voting where enough whites could be counted on to vote against the blacks' choice to defeat consistently the combined weight of solid black support plus white crossovers. J.S. 33a-35a n.6.

[44]See pp. 15-18 *supra*.

[45]*Rogers v. Lodge*, *supra*, 102 S.Ct. at 3279.

[46]*Id.* at 3286 (J. Stevens, dissenting).

[47]Compare *id.* at 3287-88 (J. Stevens, dissenting), with J.S. 87a-88a. The special features include designated ballot places, majority vote require-

"to perpetuate the power of an entrenched majority" are not necessary for the intended functioning of an at-large scheme.[48] Even though *White v. Regester*, 412 U.S. 755 (1973), speaks of these special features as "neither in themselves improper nor invidious,"[49] it does not disagree with Justice Stevens' difficulty in finding them "either desirable or legitimate,"[50] particularly "when viewed in combination" and against a backdrop of demonstrated minority vote submergence.[51]

Under this analysis, the district court's findings that the electoral choices of a geographically concentrated racial minority have consistently been excluded over a substantial period by a bloc-voting white majority, coupled with "other evidence" that the at-large scheme has special or additional features that unnecessarily exaggerate the majority's political stranglehold, satisfy an objective measure of an at-large election scheme, viewed in its entirety, as having a legislative purpose to minimize the electoral strength of black voters.[52] The Appellants did not offer at trial any compelling justifications for an election system that clearly is designed to maximize the power of an electoral majority.

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ments, anti-single-shot voting rules and other such provisions, referred to by one commentator as "percentage-determining rules." O'Rourke, "Constitutional and Statutory Challenges to Local At-Large Elections," 17 U. Rich. L. Rev. 39, 92 (1982).

[48]*Rogers v. Lodge, supra*, 102 S.Ct. at 3288 (J. Stevens, dissenting).

[49]412 U.S. at 766.

[50]*Rogers v. Lodge, supra*, 102 S.Ct. at 3288 (J. Stevens, dissenting).

[51]*Id.*

[52]See *Rogers v. Lodge, supra*, 102 S.Ct. at 3283 (J. Powell, joined by J. Rehnquist, dissenting) ("the factors identified by Justice Stevens as 'objective' in fact are direct, reliable, and unambiguous indices of discriminatory *intent*") It is the at-large system as a whole that violates blacks' constitutional rights, not just its component parts. Indeed, the special features of a majority-vote requirement and numbered places provided unnecessary protection for the white majority in Escambia County, where only two black candidates had made the runoffs in countywide elections, neither of whom had been the leading vote-getter in the first primary. J.S. 107a-09a. Thus, merely enjoining the special features in the instant action would provide little or no relief to the black victims of the intentionally dilutive scheme.

Among the "additional features" which can be shown to enhance the majority's voting strength are numbered places, majority runoffs, residency subdistricts, and "full ballot" laws (requiring the voter to cast as many votes as there are seats available for election).[53] Current research demonstrates that these additional features are found primarily in the South and affect in a measurable way the electoral chances of blacks.[54]

Judicial analysis of at-large vote dilution claims, like claims of gerrymandering, raises "special problems."[55] An at-large scheme ought not be thought of as just another potentially gerrymandered districting plan. Rather, it represents a deliberate choice not to draw district boundaries at all; that is, not to apportion seats among geographic areas but to allow the same jurisdiction-wide majority the opportunity to control all the seats.[56] Consequently, objective criteria for detecting invidious gerrymandering in districted election plans are likely not to be helpful in assessing the constitutionality of at-large schemes.[57]

Therefore, the Court should make it clear that where, in cases like the instant one, at-large election structures have systematically excluded the choices of racial minorities and are

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[53]*E.g., see* Derfner, "Racial Discrimination and the Right to Vote", 26 Vand. L. Rev. 523, 553-55 (1973).

[54]Appendix B to this brief contains two tables prepared by Profs. Engstrom and McDonald of the University of New Orleans based on their current, but not yet published, research. Blacks are elected at about 70% of their expected rate in cities that use pure at-large elections but at 22%-32% in cities that have "additional features."

[55]*Karcher v. Daggett*, 103 S.Ct. 2653, 2667 (1983) (J. Stevens, concurring).

[56]*Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("The very essence of districting is to produce a different — a more 'politically fair' — result than would be reached with elections at large"); *accord, Baker v. Carr*, 369 U.S. 186, 328 (1962) (J. Frankfurter, dissenting). *See also Rogers v. Lodge, supra*, 102 S.Ct. at 3275; *id.* at 3286 n.16 (J. Stevens, dissenting).

[57]Concepts of compactness, integrity of political boundaries, and fairness in the boundary-drawing process, *Karcher v. Daggett, supra*, 103 S.Ct. at 2672-74 (J. Stevens, concurring), have no relevance in the context of at-large voting. Where no district lines need be drawn, there is no risk that the apportionment result will look like a "crazy quilt," *id.* at 2690 (J. Powell, dissenting), *quoting Reynolds v. Sims, supra*, 377 U.S. at 569.

characterized by features that are designed to strengthen majority control, purposeful racial vote dilution will be presumed, and violation of the fourteenth and fifteenth amendments established, solely from these objective facts.

Justice Stevens' objective test of at-large vote dilution has promise as a more judicially manageable constitutional standard, which accommodates both local government interests in autonomy and the racial minority's interest in fair political access.[58] The theory should not include a requirement that the judicial remedy be restricted to striking down only the special features, leaving at-large voting intact.[59] Unlike *Rogers v. Lodge*, in the instant case, an injunction directly solely at the majority-vote and numbered place requirements would afford no relief for blacks in Escambia County.[60] If the established rule[61] requiring single-member districts in court-ordered remedies were left undisturbed, recognition of Justice Stevens' objective test would present a strong incentive for local governments voluntarily to improve minority access in their election systems rather than to wait for a judicial challenge.

This objective measure of unconstitutional vote dilution affords vulnerable racial and ethnic minorities surer protection against representational unfairness than does a subjective intent standard,[62] and it is more in line with the underlying principles of one person, one vote.[63] Recently, in *Brown v. Thomp-*

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[58]Hartman, *supra* fn. 42, at 724.

[59]*Id.* (Criticizing Justice Stevens' theory as "incomplete" if it includes such a remedial restriction). In fact, in *Rogers*, Justice Stevens thought the question "need not be decided". 102 S.Ct. at 3288 n.22.

[60]See fn. 52, *supra*. Escambia County has only a 20% black population. It contrasts sharply in this regard with Burke County, which had a 53.6% black majority. 102 S.Ct. at 3274. Consequently it is not at all "apparent", as it was for Justice Stevens in *Rogers*, 102 S.Ct. at 3288 n.22, that a well-organized black minority could elect anyone in Escambia County.

[61]*E.g., East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 (1976).

[62]See *Rogers v. Lodge, supra*, 102 S.Ct. at 3284-93 (J. Stevens, dissenting); *id.* at 3283 (J. Powell, dissenting); *City of Mobile v. Bolden, supra*, 446 U.S. at 121 (J. Marshall, dissenting).

[63]*See generally*, Parker, "The 'Results' Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard," 69 Va. L. Rev. 715 (1983); Blacksher and Menefee, "From *Reynolds v. Sims* to *City of Mobile v.*

son, 103 S.Ct. 2690 (1983), and *Karcher v. Daggett*, 103 S.Ct. 2653 (1983), the Court undertook a fresh examination of the extent to which states are bound to adhere to strict population equality notwithstanding the need to take account of other, nonpopulation factors affecting fair representation. The instant challenge to an at-large election scheme may present the converse question: To what extent may states rely on inherent population equality to justify failure or refusal to change election structures that are systematically unfair to particular racial groups? A proper resolution of both constitutional issues, however, depends on recognition of the same fundamental principle of equal protection recalled in *Brown v. Thompson* and *Karcher v. Daggett*. *Reynolds v. Sims*, 377 U.S. 533 (1964), did not simply announce a rule of numbers; rather, it acknowledged that other important representational concerns may outweigh even large population disparities[64] and that the ultimate constitutional mandate is "fair and effective representation."[65]

The Court has never suggested that the population equality rule, derived from the Civil War amendments to the Constitution, furthered a constitutional policy more important than the elimination of racial discrimination in the exercise of the franchise. To the contrary, it has identified elimination of state supported racial discrimination as a primary judicial concern because it is "illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society."[66] Further, the Court has acknowledged that the population equality rule does not by itself measure every variety of unconstitutional denial of fair and effective representation.[67] In fact, fairness of group

Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?" 34 Hastings L. J. 1 (1982).

[64]*Brown v. Thompson*, *supra*, 103 S.Ct. at 2697.

[65]*Karcher v. Daggett*, *supra*, 103 S.Ct. at 2689 (J. Powell, dissenting), *quoting Reynolds v. Sims*, *supra*, 377 U.S. at 565; accord, *Karcher v. Daggett*, *supra*, 103 S.Ct. at 2678 (J. Stevens, concurring); *id.* at 2678 (J. White, dissenting).

[66]*Regents of the University of Cal. v. Bakke*, 438 U.S. 255, 295 n.35 (1978), *quoting* A. Bickel, The Morality of Consent 133 (1975).

[67]*Brown v. Thompson*, *supra*, 103 S.Ct. at 2696; *accord*, *Karcher v. Daggett*, *supra*, 103 S.Ct. at 2671 (J. Stevens, concurring).

participation in the political process may be more important constitutionally than mere numerical equality.[68] Recognition of an Equal Protection violation under this objective standard could restore constitutional priorities in the area of fair representation.

IV. Because The Proper Legislative Authority Rejected A Proposed Constitutional Remedy, The District Court Was Correct To Order Its Own Districting Plan.

Before addressing the complicated, somewhat arcane questions of state and federal law governing the District Court's discretion in providing a remedy for the constitutional violation, a broader view of Appellants' claim should be considered. The question they present is whether the District Court was required to accept a plan advanced by the very same local officials it had found to be guilty of racial discrimination, even though their plan had just been rejected by the county's voters.

The Appellants challenge the 1979 remedial order[69] of the District Court solely on the ground, rejected by both courts

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[68]*Karcher v. Daggett, supra,* 103 S.Ct. at 2671 (J. Stevens, concurring); *accord, id* at 2683 (J. White, dissenting); *id.* 2689 (J. Powell, dissenting).

[69]There is some question whether the remedy issue in this appeal is still meaningful. Since the remedy order was entered in 1979, the District Court has conducted new proceedings as a result of the 1980 census and has considered afresh new plans presented by both the county commission and the Plaintiffs. The remedial election plan now before the Court has been replaced by another plan adopted by the District Court in 1983. The Court has denied petitions to stay implementation of the 1983 plan, and elections have been held under it. The county commissioners' challenge of the 1983 plan is now pending in the Court of Appeals. This Court denied a petition for writ of certiorari that would have bypassed the Court of Appeals. *Escambia County v. McMillan,* 52 U.S.L.W. 3246 (Oct. 4, 1983).

Technically, the remedy issue in this appeal may not be moot, because the District Court's first ground for rejecting the latest 5-2 plans of the county commissioners was law of the case, based on the instant judgment of the Court of Appeals holding that Appellants lack the requisite legislative power under Florida law. *McMillan v. Escambia County,* 559 F.Supp. 720, 725 (1983). But even if the Court were to decide in this appeal that Appellants should have been accorded legislative deference in 1979, the ruling would not necessarily answer the question whether the commis-

below, that the County Commission had the power under state law to restructure the method by which it is elected and to increase the number of commissioners. Appellants' Brief at 42. The District Court found, and the Court of Appeals agreed, that, because Escambia County's electorate had refused to adopt the home rule option offered by Florida law, the incumbent commissioners were bound by explicit state constitutional provisions governing the method of electing noncharter county commissions and lacked the legislative authority to adopt any other method of election. J.S. 68a.

A. *The Escambia County Commission Lacks the Power to Change Its Method of Election.*

The Florida Constitution sets a general policy of at-large elections for county commissions, but allows counties which adopt home rule charters to vary the method of election.[70]

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sioners' 1983 plans also should have been accorded legislative deference. Issues about the 1983 election proposals still would require fresh assessment by the lower courts. For example, it is not certain, even if the county commissioners' 1979 5-2 plan was entitled to deference, that they could still exercise the same *Wise v. Lipscomb* extraordinary legislative powers four years later. The intervening period has afforded ample time for new home rule charter proposals, legislative initiatives and even amendment of the state constitutional provision that restricts noncharter counties to five-member commissions elected at-large. No such clear legislative responses have been forthcoming, and even *Wise v. Lipscomb* suggests a time limit on the local government's emergency powers. See p. 41 *infra*.

Moreover, even if the commissioners' plans are entitled to legislative deference, the District Court has made alternative rulings that the Appellants' 1983 plans would not meet constitutional and Voting Rights standards. The commissioners "have not on the record carried the burden on them of showing that they do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. . . ." 559 F.Supp. at 726. This is a burden of Appellants must continue to bear with each new election proposal, a burden imposed both by Section 3 of the Voting Rights Act, 42 U.S.C. § 1973a, J.S. 61a, and, because they have been adjudicated guilty of purposeful racial discrimination, by the Constitution. *Sims v. Amos*, 365 F.Supp. 215, 220 n.2 (M.D. Ala. 1973) (3-judge court), *aff'd sub nom., Wallace v. Sims*, 415 U.S. 902 (1974).

[70]Fla. Const., Art VIII, § 1(e) (1968), provides "Except when otherwise provided by county charter, the governing body of each county shall

Twice within the last six years, the citizens of Escambia County have rejected referendum proposals to adopt a home rule charter. J.S. 54a, 96a. The Constitution of Florida strictly prohibits any form of election for non-home rule counties other than the at-large system. Fla. Const. Art. VIII, §1 (e). Consequently, unlike the City Council of Dallas,[71] the Escambia County Commission may not adopt another election structure.

The Attorney General of Florida agrees. In a letter dated July 19, 1983, to the Speaker of the Florida House of Representatives, the Attorney General pointed to the problem that arises when noncharter counties are successfully sued for utilizing an at-large system that dilutes blacks' voting strength. (The full text of this letter is attached to this brief as Appendix C.)

> Article VIII, §1 (e) Fla. Const. and §124.01 Fla. Stat. provide for the at-large election of county commissioners except when otherwise provided by county charter. Thus, unless a charter provides otherwise, a county is without authority under state law to enact a single-member system or other alternatives to a purely at-large election system for county commissioners.

Both the district court and the Court of Appeals interpreted the Florida Constitution in the same way. J.S. 24-26a, 68a. The long established rule in this Court is that it will not disturb the interpretation of state law concurred in by a local federal district judge, who has practiced law for many years in the state, and by the federal court of appeals for that state. *Bishop v. Wood*, 426 U.S. 341, 345-46 and n.10 (1976), *citing United States v. Durham Lumber Co.*, 363 U.S. 522 (1960); *Propper v. Clark*, 337 U.S. 472, 486-87 (1949). *Accord, e.g., MacGregor v. State Mutual Life Assurance Co.*, 315 U.S. 280 (1942).

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be a board of county commissioners composed of five members serving staggered terms of four years. After each decennial census the Board of County Commissioners shall divide the county into districts of contiguous territory as nearly equal in population as practicable. One commissioner residing in each district shall be elected by the electors of the county."

[71] *Wise v. Lipscomb*, 437 U.S. 535, 544 and n.8 (1978).

B. *The Courts Below Properly Applied Wise v. Lipscomb.*

Wise v. Lipscomb, 437 U.S. 535 (1978), holds that an election plan adopted by a local government body should be treated as a legislative plan by a federal court only if state law provides that body with the power, express or implied, to change its election structure. *Id.* at 542-46. The critical feature of *Wise* was that the City of Dallas government exercised home rule powers. *Id.* at 544 and n.8. Consequently, since there was insufficient time to complete the charter amendment process, which culminated in a referendum election, *id.* at 539 and n.3, the federal court could presume that the residual legislative power to act in such an emergency had been delegated by the state to the city, making the city council's plan one that was entitled to legislative deference. *Id.* at 544. By contrast, in the instant case, Escambia County's citizens had decided against giving the county commission home rule powers, so the district court properly concluded that the residual legislative power to change the method of election remained with the state government. The adoption of a new election plan by the county commission did not relieve the court of its duty to order its own remedial plan.

If Appellants' contention were upheld, it would emasculate the legislative authority requirement insisted on by a majority of the Court in *Wise v. Lipscomb*. It would mean that federal courts would have given the Escambia County Commission a legislative power that the Florida Constitution carefully has withheld from the local government, except where the county chooses to adopt a home rule charter. To avoid unnecessary and unseemly interference with states' prerogatives, federal courts must refer to state law to determine who has the authority to adopt new election structures. This case is a perfect example of the mischief that otherwise would be likely. Here incumbent county commissioners are asserting that, by a stroke of the pen, a federal district court has invested them with the very same legislative power that the people of Escambia County have on two recent occasions denied them. Indeed, the 5-2 elec-

tion scheme, which the Appellants claim now to have the force of law, was the one contained in the latest charter proposal rejected by the voters. J.S. 67a.

In effect, the Appellants by their contention are asking this Court to choose between competing claimants for lawmaking authority: the citizens of Escambia County, who are designated by the state constitution, and the incumbent commissioners, who claim that they have been empowered by the district court's judgment to ignore the state constitution. Other possible competing claims for "deference preference" that could be occasioned if Appellants' contentions were accepted include: different plans adopted by each house of a state legislature but rejected by the other; one plan adopted by the state legislature and another adopted by the local government; one plan adopted by the local government body and another adopted by the county's legislative delegation; a plan adopted by the legislature in one form, amended by the governor (using executive amendment power), and then rejected by the legislature in that form.

It must be remembered that a court-ordered election plan is by definition a temporary one, to remain in effect only until the proper authorities can enact a constitutionally adequate plan under state law.[72] The Court was willing to overlook Dallas' failure to comply with the full charter revision process in *Wise* only because of the shortness of time. 437 U.S. at 544 n.8. After pending elections had been held under the remedial plan, the voters of Dallas ratified the proposed change in the city's charter. 437 U.S. at 539 n.3. Had they voted it down, it would have been necessary for the district court to adopt its own temporary plan. In the instant case, however, there was sufficient time before the next elections for a properly drawn charter proposal to be presented to the Escambia County electorate, and it was rejected. In these circumstances, the district court correctly entered a court-ordered election plan. This judicial course is least likely to interfere with Florida's constitu-

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[72]*Reynolds v. Sims, supra*, 377 U.S. at 586-87; *accord, Wise v. Lipscomb, supra*, 437 U.S. at 540.

tionally crafted procedure for determining the election structures for its county commissions. The court-ordered plan will remain in force only until Escambia County's voters accept a legally and constitutionally adequate charter proposal, or until the state constitutional provisions governing the method of electing noncharter county commissions are themselves amended. Only a few weeks ago, the Attorney General of Florida asked the state legislature to consider whether changes should be made in the constitutional procedure. See Appendix C to this brief.

C. *McDaniel v. Sanchez has not overruled Wise v. Lipscomb.*

The Appellants also argue that *McDaniel v. Sanchez*, 452 U.S. 130 (1981), compels the decision that the courts below erred in their interpretation of *Wise*, because it had been modified by *McDaniel*. Brief of Appellants at 44.[73] The Appellants' argument is based entirely on one statement in *McDaniel*.[74] *McDaniel*, however, is clearly an interpretation of §5 of the Voting Rights Act, 42 U.S.C. §1973c, and not the "legislative deference" issue regarding state legislative authority to change methods of election. Indeed, the Court noted that all "parties appear to agree that the Commissioners Court had authority under Texas law to redraw the boundaries of the commissioners' precincts," 452 U.S. at 152 n.34.

Although the question of "legislative deference" and the question of §5 preclearance will often arise in the same case, *Wise* and *McDaniel* do not hold that they are analyzed the same way. Clearly, because entirely different policies are at stake, they should not be analyzed the same way. On the one hand, the policy underlying deference to state legislative authority when formulating a constitutionally adequate remedy

[73]The appellants did not suggest this theory for reversal while the appeal was pending in the Court of Appeals, nor did they mention it in their Jurisdictional Statement.

[74]"[T]he essential characteristic of a legislative plan is the exercise of legislative judgment. The fact that particular requirements of state law may not be satisfied before a plan is proposed to a federal court does not alter this essential characteristic." 452 U.S. at 152.

is the avoidance of unnecessary interference with the state's legitimate legislative processes. On the other hand, the preclearance policy of the Voting Rights Act seeks to assure strict federal scrutiny of all changes affecting voting initiated by the state or its political subdivisions.

CONCLUSION

The appeal should be dismissed for lack of jurisdiction. If the Court determines to review the merits of the appeal, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A

events, including the Democratic Party's establishment of the white primary in 1900, suggest racial motivation. There was no procedural departure, but a substantive inconsistency was soon apparent. Beginning in 1907, commissioners ran in single-member districts in the white primary, which was tantamount to election. Thus, though the constitution mandated at-large elections, the effect of the state policy was to ensure that commissioners were elected from single-member districts. The ultimate effect of all this was a system in which whites were elected in single-member districts and blacks were forced to challenge them in at-large elections. No blacks were elected under this scheme.

Although these factors indicate racial motives, in affirming another voting dilution case from the Northern District of Florida, the Fifth Circuit was able to reach the conclusion that there was no racial motivation behind the 1901 amendment because blacks were effectively disenfranchised at that time. *McGill v. Gadsden County Commission*, 535 F.2d 277, 280-81 (5th Cir. 1976). Dr. Shofner, plaintiffs' expert historian, testified that there was general disenfranchisement due to the poll tax and that blacks were no political threat at the time. Though he did not specifically mention the 1901 amendment, he did testify that another at-large requirement passed in 1895 for the school board was not racially motivated due to this disenfranchisement. The evidence did show, however, that there were always some blacks registered to vote in Florida. Furthermore, Dr. McGovern, plaintiffs' other historian,

APPENDIX B

Research of Profs. Engstrom and McDonald

Table 1
Combined Categorizations of At-Large Types
(central cities of SMSAs)

	ALL	SOUTH[1]		NONSOUTH	
		N	(%)	N	(%)
Free for all	81[2]	15	(25)	66	(75)
Residency sub-districts, majority	20[3]	16	(26)	4	(5)
Residency sub-districts, plurality	9[4]	5	(8)	4	(5)
Numbered places, majority	32	20	(33)	12	(14)
Numbered places, plurality	4	2	(3)	2	(2)
No Place, full slate[5]	3[6]	3	(5)	0	(0)
TOTAL (at large systems)	149	61	(100)	88	(100)
TOTAL (all central cities)	317	103		214	

1. Former Confederate States.

2. Contains one majority black city, Detroit. Also, 21 of the cities actually have separately elected mayors who sit on the council.

3. Contains 5 cities with separately elected mayor who sits on council. Also has 3 cities which have sub-district residency requirement for only some of the members.

4. Contains one majority black city, Augusta. Also one city has subdistrict residency requirement for some council members; Augusta has majority requirement for mayor.

5. Each voter must cast as many votes as there are seats available in the election.

6. Contains one majority black city, Birmingham, which elects council in two groups with staggered terms. The other two (Jackson and Pascagoula, MS) have full slate rule for council members but separately elected mayor sits on the council.

Table 2

Regression Equations, by system type[1]

Type	black % of council =	N
all districts	−.641 + .955 (black pop. %)	50
pure at-large	−1.74 + .697 (black pop. %)	59
pure at-large (designated mayor on council)	+4.86 + .217 (black pop. %)	21
at-large, residency, majority	+2.91 + .325 (black pop. %)	20
at-large, place system, majority vote	+5.65 + .227 (black pop. %)	32

[1]Majority black cities are excluded.

APPENDIX C

Letter of Attorney General

DEPARTMENT OF LEGAL AFFAIRS
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FLORIDA 32301

JIM SMITH
Attorney General
State of Florida

July 19, 1983

Honorable Lee Moffitt
Speaker, House of Representatives
Room 420, The Capitol
Tallahassee, Florida 32301

Dear Mr. Speaker:

It has come to my attention that a number of recent lawsuits have been filed against counties concerning at-large elections for county commissioners and school boards members. I am also informed that possibly as many as 30 additional suits may be brought against county school boards.

These suits address alleged vote dilution resulting from at-large elections. I am concerned about these cases because of the implications of the decisions in NAACP v. Gadsden County School Board, 691 F.2d 978 (11th Cir. 1982) and McMillan v. Escambia County, 638 F.2d 1239 (5th Cir. 1981).

In NAACP v. Gadsden County, supra, the Eleventh Circuit, citing Supreme Court authority, stated:

> Accordingly, to prevail in a vote dilution case under the equal protection clause of the fourteenth amendment, a plaintiff must demonstrate (1) the existence of a discriminatory purpose in either the enactment or operation of the election scheme; and (2) differential impact, i.e., dilution of the minority's voting power.

The court found that § 230.08 and § 230.10, Fla. Stat., were enacted with a discriminary purpose. Having satisfied the first prong of the vote dilution test, the court then held that the legislation has had the effect of diluting minority votes in Gadsden County, thus satisfying the second prong of the vote dilution test. Based on the facts present there, § 230.08 and § 230.10, Fla. Stat., were found unconstitutional as they apply to Gadsden County.

My first concern in view of the NAACP v. Gadsden decision is that while the factual findings regarding the discriminatory purpose behind § 230.08 and § 230.10, Fla. Stat., may be limited to Gadsden County and not be binding in future litigation, they appear to be supported by the history behind the legislation and consequently could be persuasive in future litigation. If such were the case, it would then only remain for a plaintiff to prove a differential impact (dilution) in order to prevail in a vote dilution case.

In sum, the implication of NAACP v. Gadsden could well be that in order for a plaintiff to prevail in a vote dilution case challenging the at-large election of county school board members, the plaintiff would merely have to prove dilution. This is generally proven by evidence that a substantial minority is consistently unable to elect candidates of its choice.

Assuming arguendo that a plaintiff could establish such dilution in any of these lawsuits, a dilemma becomes apparent for such counties. Sections 230.08 and 230.10, Fla. Stat., mandate that the "election of members of the school board shall be by vote of the qualified electors of the entire district." Consequently, counties, which may realize that the at-large system has diluted a minority's voting power are without authority under state law to enact a single-member system or other alternative to a purely at-large system. Such counties' hands are tied should they wish to unilaterally remedy the situation.

A similar dilemma arises in the election of county commissioners. Article VIII § 1(e) Fla. Const. and § 124.01 Fla.

Stat. provide for the at-large election of county commissioners except when otherwise provided by county charter. Thus, unless a county charter provides otherwise, a county is without authority under state law to enact a single-member system or other alternative to a purely at-large election system for county commissioners.

In order to examine means for alleviating the counties' potential dilemma, I recommend that the legislature consider this subject as an interim study project. The study project should consider amending § 230.08, § 230.10, § 124.02 Fla. Stat. and Article VIII § 1(e), Fla. Const., to allow all counties the option to utilize single-member districts for the election of school board members and county commissioners. Single-member districts at the statewide level have proven responsive to the voters' needs and are, in my opinion, appropriate to consider for the local level at least on an optional basis. Such study project should also consider the applicability and impact of the 1982 Congressional Amendments to § 2 of the Voting Rights Act of 1965, 42 USC § 1973 (Pub. L. No. 97-205, § 3, 97th Cong., 2d Sess., 1982) to vote dilution cases.

The courts have been implementing single-member redistricting plans and imposing significant attorneys' fees awards in vote dilution cases where minority plaintiffs have prevailed. Therefore, I urge your thorough consideration of this matter. I and my staff will be happy to assist the legislature in any way you desire.

If you should have any questions, please do not hesitate to contact me.

Sincerely,

/s/ JIM SMITH

Attorney General

JS: vb

cc: Honorable Bob Graham, Governor
State of Florida
Honorable Curtis Peterson, President
Senate
Mr. Donald Magruder, Executive
Director, Florida School
Board Association
Mr. John Thomas, Executive
Director, State Association of
County Commissioners of
Florida